No. 09-942

# In the Supreme Court of the United States

JASMIN ESMERALDA CORTEZ-URQUILLA, PETITIONER

*v.*

ERIC H. HOLDER, JR., ATTORNEY GENERAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the clerk of the court of appeals erred by denying a motion to reinstate a petition for review dismissed for want of prosecution.*

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* By letter of March 26, 2010, the Court requested "that a response be filed for Question Presented No. 2 only."

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The orders of the clerk of the court of appeals dismissing the petition for review (Pet. App. 17-19) and denying petitioner's motion to reinstate (Pet. App. 20) are unreported. The order of the Board of Immigration Appeals (Board) (Pet. App. 14-16) and the decision of the immigration judge (Pet. App. 1-13) are unreported.

### JURISDICTION

The order of the court of appeals was entered on September 9, 2009. The petition for a writ of certiorari was filed on December 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. An alien who fails to appear at her removal proceeding "shall be ordered removed in absentia" if the

government establishes that she was provided with written notice of the proceeding and that she is removable. 8 U.S.C. 1229a(b)(5)(A). However, it is the alien's obligation to provide the government and the immigration court with an address to which notice of the proceedings can be sent. 8 U.S.C. 1229(a)(1)(F); 8 C.F.R. 1003.15(d) (requiring alien to provide an address and telephone number within five days of service of a charging document). If the alien "fails to provide his or her address as required under [8 C.F.R.] 1003.15(d), no written notice shall be required for an Immigration Judge to proceed with an *in absentia* hearing." 8 C.F.R. 1003.26(d); see 8 U.S.C. 1229a(b)(5)(B) (same).

An alien who has been ordered removed *in absentia* may file a motion to reopen with the immigration judge (IJ) to rescind that order. 8 U.S.C. 1229a(b)(5)(C); 8 C.F.R. 1003.23(b)(4); see *In re Guzman*, 22 I. & N. Dec. 722, 723 (B.I.A. 1999) (Board lacks jurisdiction to review an *in absentia* removal order unless the alien first files a motion to reopen with the IJ to rescind the order.). An alien can prevail on such a motion to reopen only if she demonstrates that her failure to appear was the result of exceptional circumstances beyond her control; that she did not receive proper notice of the hearing; or that she was in federal or state custody and the failure to appear was not her fault. 8 U.S.C. 1229a(b)(5)(C) and (e)(1); 8 C.F.R. 1003.23(b)(4)(ii). A motion to reopen based on exceptional circumstances must be filed within 180 days of the order of removal. 8 U.S.C. 1229a(b)(5)(C)(i); 8 C.F.R. 1003.23(b)(4)(ii).

2. Petitioner is a native and citizen of El Salvador. Pet. App. 2. She entered the United States without inspection near Eagle Pass, Texas, in August 2004. Pet. 1;

Pet. App. 2. She was quickly apprehended. Administrative Record (A.R.) 12.

While petitioner was in custody, the Immigration and Naturalization Service (INS) served her with a Notice to Appear charging her with being removable as an alien present in the United States without being admitted or paroled after inspection.[1] Pet. App. 2; see 8 U.S.C. 1182(a)(6)(A)(i). The Notice to Appear did not indicate the date and time of petitioner's hearing, Pet. 1, but it did explain that petitioner was required to provide the government and the immigration court with a mailing address to which hearing notices would be sent, Pet. App. 2. In addition, petitioner was told in Spanish of her obligation to notify the immigration court of her address, *id.* at 15, and of the consequences of failing to appear, *id.* at 2. Petitioner told the INS that she was planning to live with her uncle in Houston, but did not know his address or phone number. *Id.* at 10. After the INS released her on her own recognizance, petitioner went instead to Arlington, Virginia, but never notified the government or the immigration court of her address there. Pet. 6-7; Pet. App. 9. On November 1, 2004, the immigration court in San Antonio, Texas, ordered petitioner removed *in absentia*. Pet. 1; Pet. App. 3.

3. On May 25, 2007, petitioner filed a motion to reopen, alleging that she did not receive proper notice of her removal hearing. Pet. 1; A.R. 65-67. The motion stated that petitioner wished to apply for asylum, withholding of removal, and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10,

[1] The INS's immigration-enforcement functions have since been transferred to the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. A.R. 66.[2] The IJ denied the motion to reopen as untimely. Pet. App. 1-13. The IJ noted that petitioner's motion to reopen was filed more than 180 days after the 2004 order of removal was entered, making her ineligible to claim that an exceptional circumstance prevented her appearance at her removal proceeding—and that in any event, no such exceptional circumstance existed. *Id.* at 6, 12. And because petitioner failed to supply her U.S. address, "the Court could not and had no obligation to send [petitioner] written notice of the calendared hearing." *Id.* at 2-3; see *id.* at 12 (finding that the "sole reason [petitioner] did not receive notice of the scheduled hearing was her fault"). The IJ therefore denied the motion to reopen. *Id.* at 12.

4. The Board affirmed the immigration judge's decision and dismissed petitioner's appeal. Pet. App. 14-16. The Board agreed with the IJ that by virtue of her failure to provide an address, petitioner "was not entitled to be notified of the [removal] hearing." *Id.* at 15. The Board also explained that by failing to timely challenge the *in absentia* removal order, petitioner "has also abandoned her opportunity to seek asylum, withholding of removal, or protection under the Convention Against Torture. She further does not allege that there are materially changed conditions or circumstances in El Salvador to warrant the consideration of her application."

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[2] Petitioner submitted an I-589 asylum application with her motion to reopen. A.R. 73-83. The gravamen of her asylum application was that in El Salvador, she was raped and abused by her boyfriend, a member of a notorious gang from whom the authorities could not protect her if she returned. A.R. 78, 83. She claimed that her abuser had since threatened to kill her, and had come to the United States looking for her. A.R. 83.

*Ibid.* (citing *In re A-N-*, 22 I. & N. Dec. 953 (B.I.A. 1999)). Finally, the Board found that no exceptional situation warranted *sua sponte* reopening. *Ibid.*

5. On May 27, 2008, petitioner filed a petition for review in the United States Court of Appeals for the Fourth Circuit. 08-1611 Docket entry No. 1. Petitioner was represented by attorney Michael Hadeed of Springfield, Virginia. Mr. Hadeed had not represented petitioner before the immigration courts. On June 30, 2008, Mr. Hadeed filed a motion to withdraw, stating that, "after diligent research, counsel has determined that there are no legal grounds on which to base a Petition for Review." Hadeed Mot. to Withdraw 1, Docket entry No. 7. Mr. Hadeed's motion to withdraw was granted on July 1, 2008. Docket entry No. 8. On July 21, 2008, petitioner's current counsel, Ivan Yacub, took over her representation in the Fourth Circuit and entered his appearance. Docket entry No. 17.

Shortly after Mr. Hadeed withdrew, the government moved to dismiss the petition because it was filed in the wrong venue. The relevant statute (8 U.S.C. 1252(b)(2)) requires a petition for review to be filed "with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings"—here, the Fifth Circuit, not the Fourth. On September 29, 2008, at Mr. Yacub's urging, the Fourth Circuit denied the government's motion to dismiss and entered an order transferring the case to the Fifth Circuit. Order Denying Mot. to Dismiss, Docket entry No. 23.

6. On October 2, 2008, the Fifth Circuit docketed the transferred petition as No. 08-60925. Five days later, the administrative record was filed with the clerk, and a briefing schedule issued requiring petitioner's opening brief to be filed by November 17, 2008. 08-60925 Docket

entry No. 3. However, the briefing schedule was erroneously addressed and sent to Mr. Hadeed, petitioner's former lawyer, rather than to Mr. Yacub.[3] Petitioner alleges (Pet. 3) that Mr. Yacub was never notified of the briefing schedule, and therefore did not file a brief by the due date. On December 5, 2008, a Clerk Order of the Fifth Circuit dismissed the petition for review "for want of prosecution" pursuant to Fifth Circuit Rule 42.3. Pet. App. 19.

Nine months later, on September 9, 2009, petitioner (through Mr. Yacub) filed an unopposed motion to reinstate the petition for review and set a new briefing schedule in the case. Pet'r Mot. to Reinstate Pet. for Review (Reinstatement Mot.) 1-3. It was not accompanied by a brief on the merits to be filed instanter. The motion represented that "[o]n August 10, 2009, present counsel called [the Fifth Circuit] to inquire about this case. In that phone conversation with the Clerk's Office, counsel learned that this case was dismissed on December 5, 2008." *Id.* at 3. The motion stated that neither Mr. Yacub nor petitioner was notified of, or aware of, the previous briefing schedule. *Id.* at 2-3. Mr. Yacub did not attach a supporting declaration or affidavit under oath, but he did sign the motion. *Id.* at 3.

The same day (September 9, 2009), a Clerk Order issued denying the motion to reinstate the petition. Pet. App. 20. Under Fifth Circuit Rule 27.1, petitioner was entitled to seek reconsideration of the clerk's decision before a single judge of the court of appeals, but did not.

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[3] The Fifth Circuit's docket sheet contains an entry for September 9, 2009, stating: "ATTORNEY NOT PARTICIPATING. Michael Hadeed is designated as inactive in this case. Reason: added erroneously at case opening."

Petitioner filed a petition for a writ of certiorari on December 8, 2009.

## ARGUMENT

The order below does not merit this Court's review. The court of appeals' unpublished Clerk Order does not conflict with a decision of another court of appeals. Moreover, petitioner's remedy of first resort was to obtain reconsideration of the clerk's decision before a single judge of the court of appeals, as the Fifth Circuit's rules provide, not to seek certiorari in this Court. Petitioner contends (Pet. 15-17) that the order of the clerk of the court of appeals denying her motion to reinstate her petition for review was manifestly unjust. Although the government did not oppose petitioner's motion for reinstatement in the court of appeals and agrees that reinstatement of the petition for review would have been within the court's discretion, petitioner has not shown manifest injustice and has not demonstrated circumstances warranting an exercise of this Court's supervisory power. She has not demonstrated her own diligence in preserving her petition for review or any prejudice to a meritorious immigration claim. Further review is therefore unwarranted.

1. Petitioner's failure to seek judicial reconsideration of the clerk's denial of her reinstatement motion furnishes a sufficient basis for denying the certiorari petition. Under the Fifth Circuit's relevant local rule, when an appellant fails to file a brief, "the clerk must dismiss the appeal for want of prosecution." 5th Cir. R. 42.3.2. If the appellant moves to reinstate the appeal, the clerk has discretion to rule on the motion himself or else to refer it to the court. 5th Cir. R. 27.1.6; see Fed. R. App. P. 27(b) (permitting the court of appeals to "au-

thorize its clerk to act on specified types of procedural motions"). In ruling on the motion, the clerk must apply "the standards set forth in the applicable rules." 5th Cir. R. 27.1. The clerk's decision is then subject to review by the court. Thus, the Federal Rules of Appellate Procedure specify that "[a] party adversely affected by * * * the clerk's[] action may file a motion to reconsider, vacate, or modify that action." Fed. R. App. P. 27(b). In the Fifth Circuit, "[t]he clerk's action is subject to review by a single judge upon a motion for reconsideration." 5th Cir. R. 27.1. In a civil case to which the government is a party, such a motion may be made within 45 days. *Ibid.*; see Fed. R. App. P. 40.

By authorizing litigants to obtain relief from a single circuit judge, Fifth Circuit Rule 27.1 provides an expeditious remedy for grievances with the clerk's office. A single judge can resolve such routine procedural motions with a minimal expenditure of judicial resources. Allowing petitioner to bypass that procedure in favor of a petition for a writ of certiorari is especially inappropriate in the immigration context, in which "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Stone* v. *INS*, 514 U.S. 386, 400 (1995) (quoting *INS* v. *Doherty*, 502 U.S. 314, 323 (1992)).

Moreover, as the petition in this case demonstrates, a one-sentence order from the clerk provides no basis for meaningful review by this Court. Had petitioner sought reconsideration as Fifth Circuit Rule 27.1 contemplates, the reviewing judge, to the extent warranted, could have provided a reasoned explanation of the judge's decision to grant or deny the motion. See, *e.g.*, *Bennett* v. *Mukasey*, 525 F.3d 222 (2d Cir. 2008) (Newman, J., in chambers) (explaining decision to grant rein-

statement of a defaulted petition for review). By contrast, the clerk's order in this case contains no discussion (see Pet. App. 20), and accordingly evinces no conflict with any decision of this Court or another court of appeals. Nor can petitioner plausibly contend that the clerk's decision "call[s] for an exercise of this Court's supervisory power," Sup. Ct. R. 10, rather than the supervision of the judges of the court of appeals. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, 'not of first view.'") (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

2. The courts of appeals have "discretion to reinstate an appeal that has been dismissed for appellate default." *Wapnick* v. *Commissioner*, 365 F.3d 131, 131 (2d Cir. 2004) (per curiam) (citing Fed. R. App. P. 2); see 16A Charles Alan Wright et al., *Federal Practice & Procedure: Jurisdiction and Related Matters* § 3948 & n.14 (4th ed. 2008). That discretion derives from Rule 2 of the Federal Rules of Appellate Procedure, which authorizes the court of appeals to "suspend any provision of [the Rules] in a particular case," in order "to expedite its decision or for other good cause." Fed. R. App. P. 2.

Petitioner contends that her motion for reinstatement should have been granted to prevent "manifest injustice." Pet. 15 (citing Fed. R. App. P. 2). The commentary to Rule 2 acknowledges that the Rule "contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result." Fed. R. App. P. 2 advisory committee's note (1967); see *Lattanzio* v. *COMTA*, 481 F.3d 137, 139 (2d Cir. 2007) (court may reinstate defaulted appeal for good cause or to prevent manifest injustice). To establish manifest injustice, courts usually require a

showing of diligence on the part of the complaining party, see, *e.g.*, *Robinson* v. *Wix Filtration Corp. LLC*, 599 F.3d 403, 408-409 (4th Cir. 2010) (considering manifest injustice under Fed. R. Civ. P. 59(e)); *Fox* v. *American Airlines, Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004) (under Rule 59(e), no manifest injustice when dismissal of suit "could have been avoided through the exercise of due diligence"), along with prejudice to a potentially meritorious claim, see, *e.g.*, *Lattanzio*, 481 F.3d at 139 ("Manifest injustice can result when the denial of the motion to reinstate bars an otherwise meritorious claim.").

The government agrees that when an otherwise diligent appellant is unaware of the briefing schedule due to the court's error, there will normally be grounds to reinstate the appeal if it is later dismissed for failure to file a brief. See *United States* v. *Anderson*, 921 F.2d 335, 338-339 (1st Cir. 1990) (despite local rule requiring clerk to dismiss government appeal for want of prosecution, good cause existed under Fed. R. App. P. 2 to permit the appeal because the government did not receive the briefing schedule). In this case, the clerk's error in sending the briefing schedule to the wrong lawyer may have justified reinstatement of the petition upon the filing of an appropriate motion. But in light of petitioner's failure to establish her own diligence or any prejudice to a meritorious immigration claim, the clerk's decision to deny reinstatement was not an abuse of discretion.

a. Petitioner alleges (Pet. 16) that it is "evident from the record" that her "brief was not timely filed because of an error arising out of the Fifth Circuit * * * , not because of any delay caused by [petitioner]." But petitioner's lack of responsibility for delay is not so clear. Nowhere has petitioner explained why her current coun-

sel, after securing the transfer of this case from the Fourth Circuit to the Fifth Circuit on October 2, 2008, did not inquire with the latter court about a briefing schedule until ten months later, on August 10, 2009. Even though the clerk failed to send Mr. Yacub a copy of the briefing schedule, counsel could have checked the court's docket during that ten-month period. Cf. *United States ex rel. McAllan* v. *City of New York*, 248 F.3d 48, 53 (2d Cir. 2001) (noting counsel's obligation to check the court's docket and be aware of relevant deadlines). Nor has petitioner explained why she waited 30 days after discovering the dismissal before filing a three-page reinstatement request, unaccompanied by either a brief curing the deficiency or a proffered date by which a brief would be filed. See Reinstatement Mot. 1-3; cf. 5th Cir. R. 27, internal operating procedure.[4] The absence of such a brief left the reader of the motion—either the clerk's office or a judge, to whom the motion could have been referred—without any substantial argument on the merits of petitioner's underlying immigration claim, which can be a material factor in assessing manifest injustice.

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[4] The Fifth Circuit's internal operating procedure (IOP) for Rule 27, which is appended to the end of the Rule, "provides the general sense of the court on the disposition" of motions to reinstate an appeal. 5th Cir. R. 27, IOP. The IOP cautions that the court "normally will not reinstate a case dismissed by the clerk under 5th Cir. R. 27.1.6 unless: [t]he deficiency which caused the dismissal has been remedied; and [t]he motion for reinstatement is made as soon as reasonably possible and in any event within 45 days of dismissal." *Ibid.* Although the IOP is not binding on the court, a party's promptness in bringing the error to the court's attention and curing any underlying deficiency (here, by filing a brief with the motion) are undoubtedly appropriate factors to guide the exercise of the court's discretion.

b. Petitioner has also failed even in this Court to show prejudice to a meritorious immigration claim. The Board and the IJ correctly recognized that an alien, like petitioner, who fails to provide the required address after being advised of her obligation to do so cannot insist upon notice of her *in absentia* removal hearing. Pet. App. 2-3, 15; 8 U.S.C. 1229a(b)(5)(B); 8 C.F.R. 1003.26(d); see *Shia* v. *Holder*, 561 F.3d 19, 21 (1st Cir. 2009) (upholding Board's denial of motion to reopen *in absentia* removal order when alien failed to furnish address); *In re Villalba*, 21 I. & N. Dec. 842, 845 (B.I.A. 1997) (notice requirements in charging document and notice of hearing reasonably construe Congress's mandate "that no hearing notice is required where an alien fails to provide the required address information").[5] Petitioner asserts (Pet. 7) that she had no obligation to update her address because the date of her removal hearing was not listed on the Notice to Appear. The clear text of the relevant regulation and statute establish otherwise. 8 C.F.R. 1003.15(d) ("If the alien's address is not provided on the Order to Show Cause or Notice to Appear, or if the address on the Order to Show Cause or Notice to Appear is incorrect, the alien must provide to the Immigration Court where the charging document has been filed, within five days of service of that document, a written notice of an address and telephone number at which the alien can be contacted."); see 8 U.S.C. 1229(a)(1)(F) (noting "[t]he requirement that the alien must immediately provide (or have provided) the Attorney General with a written record of an ad-

[5] *Villalba* cited Section 242B(c)(2) of the Immigration and Nationality Act, which applied to that case. 21 I. & N. Dec. at 845. That section was repealed in 1996, but the same mandate continues to exist at 8 U.S.C. 1229a(b)(5)(B).

dress and telephone number (if any) at which the alien may be contacted respecting [removal] proceedings"). Accordingly, there is no substantial likelihood that the court of appeals would have granted the petition for review, and petitioner does not seriously contend otherwise.

Under these circumstances, petitioner cannot demonstrate that the clerk's decision not to reinstate her petition for review amounted to manifest injustice.[6]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

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[6] Petitioner alleges (Pet. 16) that manifest injustice is also shown by the "aggravating factor" that her former attorney, Mr. Hadeed, has been convicted of immigration fraud. But she does not explain the relevance of Mr. Hadeed's misconduct to her petition. Petitioner implies that Mr. Hadeed did not inform her or her current counsel of the briefing schedule addressed to him by the Fifth Circuit. Pet. 2-3. But Mr. Yacub told the Fifth Circuit that both he and petitioner were unaware of the briefing schedule, Reinstatement Mot. 2-3, and there is no reason to conclude that the court of appeals disbelieved that representation.